

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In The Matter of)	
)	
Rules and Regulations Implementing the)	
Telephone Consumer Protection Act of 1991)	CG Docket No. 02-278
)	
Petition for Rulemaking and Declaratory Ruling)	CG Docket No. 05-338
of Craig Moskowitz and Craig Cunningham)	

REPLY COMMENTS OF THE INTERNET ASSOCIATION

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The Internet Association hereby submits these reply comments in opposition to Craig Moskowitz’s and Craig Cunningham’s (“Petitioners”) Petition for Rulemaking and Declaratory Ruling (“the Petition”).¹

INTRODUCTION AND SUMMARY

The Internet Association is the unified voice of the Internet economy.² We represent the interests of leading Internet companies and their global community of users. We strongly oppose Petitioners’ request that the Commission reject its long-held position that a consumer expresses consent to receive informational communications when he or she knowingly provides a telephone number to a dialing party.

¹ Petition of Craig Moskowitz and Craig Cunningham for Rulemaking and Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (FCC Jan. 22, 2017) (“Petition”).

² The Internet Association represents the world’s leading Internet companies, including: Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Expedia, Facebook, FanDuel, Google, Groupon, Handy, IAC, Intuit, LinkedIn, Lyft, Microsoft Monster Worldwide, Netflix, Pandora, PayPal, Pinterest, Practice Fusion, Rackspace, reddit, Salesforce.com, Snap, Spotify, SurveyMonkey, Ten-X, TransferWise, TripAdvisor, Turo, Twitter, Uber Technologies, Inc., Upwork, Yahoo!, Yelp, Zenefits, and Zynga.

As we explained in our initial comments, the Commission has appropriately recognized that communications between parties in a commercial relationship are expected, and that dialing parties should not be penalized when they act in good faith—and confine their communications to the anticipated scope of these relationships.³ The Commission’s long-held interpretation that provision of a telephone number itself evidences “prior express consent” under the Telephone Consumer Protection Act (“TCPA”) applies common sense, and properly accounts for the reality of commerce and communication in the Internet age, fosters communications that are vital to and desired by consumers, and appropriately insulates from liability dialing parties who act in good faith.⁴ We also pointed out how Petitioners’ proposal would dramatically increase the burdens on regulated parties and would exacerbate existing concerns arising from other aspects of the Commission’s recent declaratory ruling and order.⁵

A majority of commenters supported the points raised in our initial comments. Nearly twenty comments, representing over thirty commenters and thousands of businesses, explained how companies and organizations rely on the Commission’s interpretation when sending a plethora of critical communications to consumers—ranging from fraud alerts, time-sensitive medical reminders, and shipping notifications, to notices of utility service outages or communications regarding grassroots political efforts.⁶ These commenters provide ample support

³ Comments of the Internet Ass’n at 3-8 (“Initial Comments”).

⁴ *Id.* at 3-7, 9.

⁵ *Id.* at 10-12.

⁶ *See, e.g.*, Comments of ACA Int’l; Comments of the Am. Bankers Ass’n; Comments of the Am. Fin. Servs. Ass’n, Consumer Bankers Ass’n, Credit Union Nat’l Ass’n, Elec. Transactions Ass’n, Fin. Servs. Roundtable, and Nat’l Ass’n of Federally-Insured Credit Unions (“Comments of the Am. Fin. Servs. Ass’n, *et al.*”); Public Comment of Ams. for Prosperity; Comments of Cardinal Health, Inc.; Comments of the Consumer Mortgage Coal.; Comments of the Edison Electric Inst., the Am. Gas Ass’n, and the Nat’l Rural Electric Cooperative Ass’n (“Comments of the Edison Electric Inst., *et al.*”); Comments of the Emergency Commc’ns Network; Comments of the Indep.

for the Commission's sensible determination that "wireless services offer access to information that consumers find highly desirable," and its decision to therefore interpret the "prior express consent" requirement to avoid "discourag[ing] purely informational messages."⁷

With a single exception, the few commenters supporting the Petition do not even attempt to argue that these informational communications are bothersome or unwelcome;⁸ instead, those commenters focus almost exclusively on arguing that the plain language of the TCPA supports Petitioners' proposal.⁹ But these commenters hold an erroneous understanding of what constitutes

Cnty. Bankers of Am.; Comments of the Medical Grp. Mgmt. Ass'n; Comments of the Nat'l Ass'n of Chain Drug Stores; Comments of the Nat'l Auto. Dealers Ass'n; Comments of the News Media Alliance; Comments of the Nat'l Retail Fed'n; Comments of the Or. Cnty. Credit Union; Opp'n of the Republican Nat'l Comm.; Comments of the Retail Indus. Leaders Ass'n; Comments of Prof'l Ass'n for Customer Engagement; Comments of Alpha Media, LLC, Emmis Commc'ns Corp., Entercom Commc'ns Corp., iHeartMedia, Inc., Minn. Pub. Radio, and Radio One, Inc. ("Comments of Joint Broad. Commenters").

⁷ *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1841 ¶ 29 (2012) ("2012 Order").

⁸ See Anderson + Wanca's Comments on Petition for Rulemaking & Declaratory Ruling of Craig Moskowitz & Craig Cunningham ("Comments of Anderson + Wanca"); Comments in Support of the Petition for Declaratory Ruling filed by the Nat'l Consumer Law Ctr. on behalf of its low-income clients ("Comments of the Nat'l Consumer Law Ctr."). But see Comments of Diana Mey.

⁹ These reply comments focus on Petitioners' argument that the Commission's existing interpretation is inconsistent with the TCPA's requirement that prior consent be *express* because, in Petitioners' (erroneous) view, an individual's conduct in knowingly providing a telephone number is not an express form of consent. See, e.g., Petition at 18. In these reply comments, we do not discuss Petitioners' additional proposal that consent must also be obtained in *written* form. See, e.g., *id.* at 4 ("Although Petitioners acknowledge that the Commission arguably has the power to allow prior express consent . . . to be obtained orally, Petitioners urge the Commission to require that such consent be in writing."); *id.* at 37 (urging the Commission to require "that the same prior express written consent it already requires for cell phone calls and residential phone calls involving telemarketing and advertising be applied across the board to all telephone calls" covered by the TCPA, except certain healthcare or nonprofit organization calls). Nevertheless, we agree with those commenters who note that requiring written consent is inconsistent with the TCPA, that such consent would be particularly burdensome for dialing parties communicating only informational messages, and that the Commission has acted well within its discretion to refuse to require onerous written consent for purely informational calls. See, e.g., Opp'n of Sirius XM Radio Inc. at 7-8; Comments of Prof'l Ass'n for Customer Engagement at 6-7; Comments of the Or. Cnty. Credit Union at 2. The Commission has previously rejected a written consent requirement that would

express consent, and they overlook the fact that affirmative conduct may just as equally demonstrate consent as an oral or written statement.¹⁰

Indeed, Congress provided the Commission with discretion to apply the TCPA flexibly to those calls the Commission concludes are not a nuisance or an invasion of privacy.¹¹ The Commission's existing interpretation properly takes into consideration the context in which many purely informational messages are communicated. Petitioners' proposal simply does not account for advances in technology and the current ubiquity of the Internet and the telecommunications economy; nor does it account for common sense.

The Internet Association urges the Commission to deny the Petition and, in doing so, reiterate that consent may be expressed when a consumer provides a telephone number to a dialing party with no instructions to the contrary. So long as the dialing party acts in good faith and the communications remain within the scope of the parties' relationship, the TCPA's express consent requirement is satisfied.

I. As the Vast Majority of Comments Explain, Businesses, Utilities, Schools, Local Governments, and Other Entities Communicate a Wide Array of Beneficial, Welcomed Information to Consumers Pursuant to the Express Consent Evidenced When a Consumer Provides a Telephone Number.

In our initial comments, we explained how the Internet Association's members have been pioneers in establishing new and innovative ways for people and businesses to engage in commerce. These new businesses and services necessarily involve the use of computerized,

"unnecessarily impede" purely informational calls providing "bank account balance, credit card fraud alert, package delivery, and school closing information," among other things. 2012 Order, 27 FCC Rcd at 1838 ¶ 21. Petitioners provide no compelling reason to revisit that determination.

¹⁰ See *infra* at 8-10.

¹¹ See *infra* at 10.

tailored, and targeted messages that consumers desire.¹² Ridesharing applications, food delivery services, airline and hotel price alerts, social media notifications, and innumerable similar communications place information at consumers' fingertips that allow them to access services they desire, structure their everyday lives, and communicate with loved ones. In addition, businesses often send notifications to consumers disclosing potential instances of identity theft or fraud, or possible data breaches.¹³ These consumer protection efforts are of critical importance.

Virtually all commenters agree with this assessment. Nearly twenty comments, representing more than thirty commenters and thousands of businesses, demonstrate that the Internet Association's members are far from alone in providing these types of communications. The comments evidence widespread agreement that such messages—touching on all aspects of Americans' everyday lives—are commonplace, beneficial to consumers, normal, expected, and desired.

Some entities, including banks and collection agencies, provide their customers with important payment and billing information, or inform consumers about suspicious account activity.¹⁴ These communications can have financial consequences. They assist consumers in remaining current on payments, avoiding delinquency, and avoiding adverse consequences like negative credit report comments or wage garnishment.¹⁵ Other communications assist consumers to maintain their health and wellness, and provide prescription refill reminders, medicine delivery

¹² See Initial Comments at 4-5.

¹³ *Id.* at 8-10.

¹⁴ See, e.g., Comment of the Am. Bankers Ass'n at 3, 13; Comments of the Indep. Cmty. Bankers of Am. at 2; Comments of the Retail Indus. Leaders Ass'n at 2; Comments of the Edison Electric Inst., *et al.* at 3.

¹⁵ See, e.g., Comments of ACA Int'l at 3-4; Comments of the Am. Fin. Servs. Ass'n, *et al.* at 4.

confirmations, and immunization reminders.¹⁶ Companies or local governments provide information about planned or unanticipated utility outages, and interruptions to public services like road work, changes to garbage collection schedules, and boil water notices.¹⁷ And broadcasters provide news, weather, traffic, and school closing alerts.¹⁸ For consumers, these convenient reminders—for which they willingly supplied their telephone numbers—are an efficient means to structure their lives and balance competing demands on their time.

Consumers also receive desired communications as a result of products they order, services they request, or organizations they choose to join. For example, the News Media Alliance notes that its members often alert customers when newspaper delivery will begin (allowing customers to contact customer service if they do not receive their newspaper as expected), when there is a payment or billing issue with a customer's credit card, when delivery will be delayed due to weather, or to confirm a customer's temporary suspension of service.¹⁹ Other commercial entities similarly provide notifications when orders have arrived or products are ready for pickup.²⁰ And rapid communications are often essential for grassroots political organizing activities. "Telephone outreach campaigns are a critical part of political activism, and while the TCPA itself makes such

¹⁶ See, e.g., Comments of the Retail Indus. Leaders Ass'n at 2; Comments of Cardinal Health, Inc. at 3; Comments of the Nat'l Ass'n of Chain Drug Stores at 2.

¹⁷ See Comments of the Edison Electric Inst., *et al.* at 3-4; Comments of the Emergency Commc'n Network, LLC at 1.

¹⁸ See Comments of Joint Broad. Commenters at 11-12.

¹⁹ See Comments of the News Media Alliance at 2.

²⁰ See, e.g., Comments of the Nat'l Auto. Dealers Ass'n at 2; Comments of the Nat'l Retail Fed'n at 5; Comments of the Retail Indus. Leaders Ass'n at 2.

activism more difficult, the Commission's construction of 'prior express consent' affords nonprofits . . . with a workable standard."²¹

In each of these scenarios, a telephone number is exchanged during an initial transaction among the parties. A relationship is created, and subsequent communications are expected. So long as the dialing party acts in good faith, and transmits only informational messages closely related to the scope of the parties' relationship, these messages should not implicate the TCPA. Indeed, when the House Energy and Commerce Committee recommended passage of the TCPA, it explained that it did not intend the legislation to pose a "barrier to the normal, expected or desired communications between businesses and their customers."²²

However, as several commenters explain, requiring a consumer to provide specific written consent explicitly to receive non-marketing, informational communications, such as a simple confirmation, after already providing the telephone number with an expectation of receiving normal communications in connection with the established commercial relationship, would pose precisely such a barrier. It would force businesses and other entities to forego beneficial communications or to undertake time-intensive and expensive efforts to individually contact existing customers to obtain renewed, and more specific consent.²³ Nothing before the Commission supports the idea that imposing those onerous burdens on dialing parties would be useful to combat the types of harassing messages that the TCPA was intended to curtail.²⁴

²¹ Opp'n of the Republican Nat'l Comm. at 3; *see also* Comments of Ams. for Prosperity at 1 ("Adoption of the proposed rule could result in a chilling effect on grassroots organizations, who would be unable to contact many of their grassroots activists if the FCC modified its definition of 'prior express consent.'").

²² H.R. Rep. No. 102-317, at 17 (1991).

²³ *See, e.g.,* Comments of the Am. Bankers Ass'n at 14; Comments of ACA Int'l at 12.

²⁴ Of most relevance is the fact that the percentage of consumers who opt out of receiving such messages is astonishingly low. *See In re Rules and Regulations Implementing the Telephone*

To the contrary, there is a conspicuous lack of comments contending that these commonplace communications are bothersome. In fact, only a *single* commenter expressed any concern regarding the content or desirability of these beneficial communications, and even that commenter referenced only one instance in which she received unwanted calls from a business with which she had transacted.²⁵ With respect to the other three instances she raised, the commenter did not claim that she had ever received even a single unwanted call as a result of providing a telephone number.²⁶ The absence of other commenters making such claims is unsurprising. As explained in our initial comments,²⁷ and confirmed by the substantial number of comments from entities that provide similar communications,²⁸ such communications are normal, expected, and desired.

II. The Commission’s Interpretation of Express Consent is Entitled to Deference, and the Comments Supporting the Petition Misunderstand the Concept of Express Consent.

Commenters supporting the Petition rely almost entirely on what they describe as the unambiguous language of the TCPA.²⁹ However, as the Commission has explained, “the TCPA is silent on the issue of what form of express consent—oral, written, or some other kind—is

Consumer Protection Act of 1991, Declaratory Ruling and Order, 30 FCC Rcd 7961, 8086 (2015) (“2015 Order”) (dissenting statement of Commissioner O’Rielly) (citing comments demonstrating that only 634 of 449,909 Fairfax County Public Schools automated message recipients, or 0.14%, opted out of receiving future messages, and that only 0.35% of Anthem’s non-marketing healthcare message recipients opted out of receiving future messages).

²⁵ See Comments of Diana Mey.

²⁶ See *id.* at 2-3.

²⁷ See Initial Comments at 3-6.

²⁸ See *supra* notes 14-21.

²⁹ See Comments of Anderson + Wanca at 1-2; Comments of the Nat’l Consumer Law Ctr. at 2-3; see also Petition at 17-22.

required” under the TCPA.³⁰ Indeed, Petitioners themselves concede that “[b]ecause the TCPA does not define the term ‘prior express consent,’ the Commission arguably has authority to define what constitutes such prior express consent.”³¹

That concession is fatal to the claim that the plain language of the TCPA precludes the Commission’s interpretation. It is hornbook law that consent can be “manifested directly to the other by words *or acts* that are intended to indicate that it exists.”³² Indeed, as the Court of Appeals for the Third Circuit has explained, even “[e]xpress consent may be given by words or *affirmative conduct*.”³³

The Commission’s interpretation of “prior express consent” is reasonable.³⁴ Social norms dictate that, when one provides a telephone number willingly, and without conditions, he or she expresses an intent to receive communications at that number. “To hold otherwise would

³⁰ 2012 Order, 27 FCC Rcd at 1838 ¶ 21. As we explained in our initial comments, members of Congress certainly read the law to exclude certain calls made following the provision of a telephone number to a dialing party. *See* Initial Comments at 6 (quoting H.R. Rep. No. 102-317, at 17). As we also explained, this statement is not inconsistent with an earlier Senate Committee Report, which merely rejected a proposal to exclude similar calls from the TCPA altogether. *See id.* at 6 n.11. Regardless, any discrepancy between the two reports’ understandings simply confirms the ambiguity that results from the fact that Congress left the phrase “express consent” undefined. *See id.*

³¹ Petition at 22.

³² *Restatement (Second) of Torts* § 892 cmt. b (1979) (emphasis added).

³³ *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 148 (3d Cir. 1998) (emphasis added).

³⁴ We disagree with those commenters who equate the Commission’s interpretation with implied consent. *See, e.g.*, Comments of the Indep. Cmty. Bankers of Am. at 1-2; Comments of the Nat’l Retail Fed’n at 8. The Commission has clearly stated that the TCPA and the Commission’s rules “plainly require *express* consent, not implied or ‘presumed’ consent.” 2015 Order, 30 FCC Rcd at 7991 ¶ 52. The affirmative action taken when a consumer provides his or her phone number constitutes a form of express—and therefore, not implied—consent.

contradict the overwhelming weight of social practice: that is, distributing one's telephone number is an invitation to be called, especially when the number is given at another's request."³⁵

Reading "express consent" to encompass the provision of a phone number is also fully consistent with congressional intent. When it enacted the TCPA, Congress afforded the Commission "the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy."³⁶ Accordingly, the Commission has set more onerous requirements for the types of marketing and advertising calls that the TCPA was primarily intended to curtail, than it has for purely informational communications that are part and parcel of normal business relationships. It is therefore unsurprising that the Commission requires a specific form of express consent for the former type of communications, but permits a more flexible form of express consent for the latter.

³⁵ *Pinkard v. Wal-Mart Stores, Inc.*, No. 3:12-cv-02902-CLS, 2012 WL 5511039, at *5 (N.D. Ala. Nov. 9, 2012) (footnote omitted). Indeed, given the inherent purpose of a telephone number (that is, for communication), it is possible to construe the oral or written provision of that number to a dialing party as, itself, a form of *oral* or *written* consent. It is also of no moment whether the individual indicates that he or she would consent to calls communicated specifically by an autodialer or a prerecorded voice. In the subsection of the TCPA relevant to cellular telephones, the qualifier "(other than a call made for emergency purposes or made with the prior express consent of the called party)" immediately follows the phrase "make any call," but precedes the phrase "using any automatic telephone dialing system or an artificial or prerecorded voice." 47 U.S.C. § 227(b)(1)(A). This ordering is best read to indicate that an individual need only provide consent for the *call*, and need not consent to the particular *method* by which the communication is transmitted. To be sure, the Commission has chosen, in those instances in which it requires *written* consent, to require more particularized consent that expressly authorizes "the seller to deliver" a message "using an automatic telephone dialing system or an artificial or prerecorded voice." 47 C.F.R. § 64.1200(f)(8). But the Commission's reasonable decision to require more specific consent for the types of calls Congress anticipated would pose the greatest nuisance does not mean that the statute necessarily requires similar particularized consent for all calls.

³⁶ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(13), 105 Stat. 2394, 2395; *see also* 2012 Order, 27 FCC Rcd at 1841-42 ¶ 29 (noting that the Commission "employ[s] the flexibility Congress afforded to address new and existing technologies").

Petitioners’ proposal simply fails to account for the fact that the Commission may reasonably consider the particular contexts in which communications are made. Consumers increasingly expect to have access on their mobile devices, and at their fingertips, to a wide range of services and information. When a consumer initiates a business transaction or seeks access to a service, and knowingly provides a telephone number as part of that transaction, he or she expressly consents to be contacted regarding that transaction or service. Indeed, these are the “frictionless transactions” consumers have come to expect in an e-commerce context. If the dialing party acts in good faith, and within the scope of the relationship, when subsequently contacting that telephone number, the dialing party does not contravene the TCPA’s “prior express consent” requirement.

III. Other Commenters Agree That Accepting Petitioners’ Proposal Would Exacerbate the Pressing Problems That Other Aspects of the Commission’s Recent Declaratory Ruling and Order Pose.

By itself, Petitioners’ proposal would pose significant burdens on dialing parties.³⁷ In our initial comments, moreover, we explained how Petitioners’ proposal is all the more problematic because it would eliminate one of the Internet Association’s members’ few remaining bulwarks against ever-expanding TCPA liability.³⁸ We noted that the Commission’s current treatment of reassigned telephone numbers and consumers’ revocation of consent—which is currently being challenged on appeal before the Court of Appeals for the D.C. Circuit³⁹—both pose significant

³⁷ See, e.g., Comments of Prof’l Ass’n for Customer Engagement at 7 (noting that “[a]lthough the caller would not be required to obtain a signed writing,” under Petitioners’ alternative proposal to require oral consent, “because the caller must prove consent it would need to maintain a system to track that it provided disclosures and the called party orally consented.” (footnote omitted)).

³⁸ See Initial Comments at 10-12.

³⁹ See *ACA Int’l et al. v. FCC*, Case No. 15-1211 (D.C. Cir.).

hurdles to dialing parties' efforts to communicate with consumers without exposure to TCPA liability.⁴⁰

Other commenters agree with that assessment. For example, the National Retail Federation notes that retailers “continue to face excessive litigation” resulting from communications to numbers for which a store had prior consent to contact but, unbeknownst to the retailer, have been reassigned to new customers.⁴¹ Similarly, retailers face lawsuits from plaintiffs who take advantage of the Commission’s any-reasonable-means standard for revoking consent, “even where a plaintiff appears to have purposefully avoided using a known and easy-to-use mechanism provided by a store to halt further text communications.”⁴²

Until the Commission has an opportunity to revisit its rulings on these matters, it should at least reiterate that a dialing party who acts in good faith when contacting a phone number that was provided knowingly does not contravene the TCPA’s prior express consent requirement. Doing so would, at least to some degree, appropriately protect the dissemination of normal, purely informational communications that consumers desire.

⁴⁰ *See id.*

⁴¹ Comments of the Nat’l Retail Fed’n at 8.

⁴² *Id.*; *see also* Comments of the Consumer Mortg. Coal. at 5 (explaining how these clarifications inhibit communications with borrowers, and conflict with federal policies that seek to prevent foreclosures).

CONCLUSION

For the foregoing reasons, the Commission should deny the Petition for Rulemaking and Declaratory Ruling.

Respectfully submitted,

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